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10 SUPERIOR COURT OF CALIFORNIA
11 SANTA CRUZ COUNTY
12

13 **COUNTY OF SANTA CRUZ,**

Petitioner/Plaintiff,

15 v.

16 **CALIFORNIA DEPARTMENT OF FOOD AND**
17 **AGRICULTURE, et al.,**

18 Defendants/Respondents.

Case No. 158516

19 **CITY OF SANTA CRUZ,**

Plaintiff/Petitioner,

21 v.

22 **CALIFORNIA DEPARTMENT OF FOOD AND**
23 **AGRICULTURE, et al.,**

24 Defendants/Respondents

**BRIEF IN OPPOSITION TO
MOTION SEEKING WRIT OF
MANDATE**

Date: April 24, 2008

Time: 8:30 a.m.

Dept: 8

Judge: Burdick

Trial Date: N/A

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INTRODUCTION

In this case, Petitioners the City of Santa Cruz, and County of Santa Cruz, challenge a notice of exemption from the California Environmental Quality Act (CEQA) filed by the Secretary of Food and Agriculture in connection with an emergency eradication project for the light brown apple moth in Santa Cruz County. Petitioners have failed to carry their heavy burden of establishing that the administrative record fails to include any substantial evidence that the discovery of the light brown apple moth in the wild, and the threat it poses, is a sudden occurrence and imminent threat requiring immediate action. The record contains more than substantial evidence from which a reasonable person could conclude that the threat posed by the light brown apple moth satisfies every element of the definition of a CEQA emergency. Moreover, in the Light Brown Apple Moth Act of 2007, the Legislature found that the light brown apple moth is a significant imminent threat to California's agriculture, natural environment, and native plants and animals. The Legislature established at least a portion of the factual predicates to a CEQA emergency which are binding on this Court. Because Petitioners have failed to carry their heavy burden, and because substantial evidence supports the CEQA exemption, Respondents request that the Court deny Petitioners' motion.

STATEMENT OF FACTS

A. Discovery and Spread of the Light Brown Apple Moth in California.

On February 6, 2007, the California Department of Food and Agriculture (Department) first confirmed that two light brown apple moths had been detected in Berkeley, California, and that an expert in Australia identified the insects. (AR 000027.)^{1/} The moths detected in Berkeley were the first of this moth species detected in the wild in the continental United States. (AR000150.)^{2/} By February 13, 2007, the Respondents had formulated a plan to conduct trap surveys to identify the scope of light apple moth infestation. (AR 000028, 000029.)

1. A University of California professor trapped the light brown apple moth in early 2007, and sent the moth to Australia for identification. (AR 000251.) In addition, the professor may have trapped similar moths in July and November, 2006, but this could not be officially confirmed. (AR 000251.) It appears that the University of California professor did not seek to identify the moths until early 2007. (AR000027.)

2. Previously, the light brown apple moth had been detected in a few U.S. Ports being transported by small number of passengers entering the U.S. (AR 0000149-000150.) The vast majority of these detections were in Honolulu, with only 2% of the detections in San Francisco. (AR0000150.) The screening process at the U.S. Ports appears to have prevented the light brown apple moth from becoming established in the wild prior to 2007. (AR 000136-000139, 000150.)

1 The Department placed traps throughout the state in the spring of 2007 to determine the area
2 of infestation. (AR 000030-000032.) By March 19, 2007, trapping identified light brown apples
3 moths in an area 30 square miles surrounding the initial capture in Berkeley. (AR 002075.)
4 Subsequently, the Respondents prepared daily reports on the trapping and survey results. (AR
5 002075-002619.) By June 21, 2007, the light brown apple moth was detected in eleven counties:
6 Alameda, Contra Costa, Marin, Monterey, Napa, San Francisco, San Mateo, Santa Clara, and Santa
7 Cruz. (AR 002336-002338.) By October 2, 2007, the survey effort detected light brown apple
8 moths in Los Angeles, and Solano Counties. (AR 002612.) The highest levels of infestation were
9 in Santa Cruz County. (AR 002337, 002612.)

10 **B. The Threat Posed by the Light Brown Apple Moth.**

11 The light brown apple moth is native to Australia, and it has become established in New
12 Zealand, New Caledonia, Hawaii, and the British Isles. (Administrative Record (AR) 000120,
13 0000145.) The light brown apple moth is a highly voracious pest that feeds on over 200 plants
14 including many agricultural products grown in California. (AR 000120, 000122-131, 0000145.) It
15 continually reproduces and passes through at least to three generations per year in California with
16 no true dormancy. Adults deposit egg masses containing 20-50 eggs on leaves or fruit. The larvae
17 then construct shelters on the leaves, buds, or fruit, damaging the plants and fruit. (AR 000089,
18 000120, 000129, 0000132, 0000149-0000150, 000179.) During severe outbreaks damage to fruit
19 may be as high as 85%. (AR 0000150.)

20 Consequently, the potential impact from established light brown apple moths in California is
21 severe and estimated to be hundreds of millions of dollars. (AR 000120-000121, 005868-5869.)
22 Initially at the time of discovery of the light brown apple moth in spring of 2007, the Respondents
23 used the lost production and control costs documented from Australia (where the species is native)
24 and applied those costs to the California market for a apples, pears, oranges, and grapes, using
25 figures from 2006, and concluded that potential losses to these fruits is \$70.2 million. (AR000120-
26 000121.) Respondents then estimated losses to the California apricot, avocado, kiwi fruit, peach,
27 and strawberry crops, by utilizing the same documented loss figures for Australian apples, pears,
28 oranges, and grapes, and concluded that additional losses of \$63.1 million might be possible.

1 Finally, Respondents noted that exact economic impacts from international and domestic quarantines
2 were uncertain, though potentially large because California farmers exported \$7.2 billion in food and
3 agricultural commodities world wide. (AR 000121.) The impact from quarantines is highly probable
4 because 80% of the continental United States is climatically suitable for the light brown apple moth.
5 (AR 005865.) Respondents' estimate is extremely conservative, and does not consider the loss to
6 the numerous other agricultural products at risk in California, the economic ripple effect associated
7 with crop failure and quarantine-trucking companies, food processors, and their employees would
8 all suffer economic harm.

9 By July, 2007, the United States Department of Agriculture issued a draft "Preliminary
10 Assessment of the Economic Impact of . . . Light Brown Apple Moth." (AR 001175.) That
11 preliminary assessment considered the crop values for the crops that are known to be hosts to the
12 light brown apple moth, and provided an assessment of the costs that may be associated with the
13 light brown apple moth if no eradication program is undertaken. (AR 001176.) This analysis used
14 a similar methodology as used by the Respondents and applied the total market loss due to yield
15 reduction documented in Australia and applied those figures to the value of all host crops in the
16 eleven California counties where the light brown apple moth has been found. (AR 000461-000466,
17 001178.) The analysis applied the low end estimate of 5% yield reduction, a mid level estimate of
18 10% yield reduction, and a high end estimate of 20% yield reduction to conclude that the potential
19 losses could be between \$160 million to \$640 million. (AR 001178.)

20 The United States draft preliminary assessment also calculated the cost of a delay in initiating
21 the eradication program, and concluded that a one year delay would raise the annual cost of
22 eradication by millions of dollars. (AR001177.) The costs of delayed eradication were based on
23 an assumption that the delay could cause a 5-10% increase in the acreage infested by the light brown
24 apple moth. (AR 001177.) This estimate of increased acreage infestation is extremely conservative.
25 It does not consider that the primary threat for expansion of the light brown apple moth is human
26 assisted movement of the host plant stock and commodities. (AR 000083.) The expansion of light
27 brown apple moth infestation documented by Respondents is consistent with human assisted
28 movement. For example, on April 12, 2007, Respondents and county agricultural commissioners

1 determined that plant infestations documented in San Francisco originated, among other locations,
2 from Santa Cruz County. (AR002122.) Shortly thereafter, it became clear that Santa Cruz County
3 had the highest level of infestation, even though in 2005 traps detected no light brown apple moths
4 in Santa Cruz County. (AR 000031, 002337, 002612.) Consequently, it appears that human assisted
5 movement was effectively transporting the light brown apple moth from Santa Cruz County to other
6 parts of the state. The estimates of economic impact from delay also does not consider the risk that
7 the mating disruption treatment may not be effective later, and the delayed eradication treatment may
8 involve ariel spraying of *bacillus thuringiensus* (Bt), which is an insecticide that is a lethal agent and
9 is not species specific. (AR 000038, 001590, 001626.)

10 The United States Department of Agriculture updated it economic analysis, and analyzed the
11 loss expected for apple, grape, orange and pear production in the United States. (AR 001208.)
12 Similar to Respondents' economic analysis, the United States chose these commodities because the
13 economic effects have been reported for Australia. (AR 001208.) The United States used U.S.
14 figures from 2002, and estimated losses of between approximately \$77 million and \$134 million for
15 these limited crop categories. (AR 001211, 001212.)

16 Though it is a simple point of fact, it is quite important to note that the light brown apple moth
17 threatens to cause direct damage to the natural environment through the increased use of pesticides
18 by commercial and residential growers, and by feeding on native and threatened plants. (AR
19 000121.)

20 **C. The Regulatory Response.**

21 **1. The Technical Working Group.**

22 Because the threat posed by the light brown apple moth is of national concern the United States
23 Department of Agriculture appointed a technical working group composed of internationally
24 recognized scientific experts in the fields of biology and life history of the insect, pheromone
25 technology and control methodologies. (AR 000028, 000029, 000032, 00035-41.) The technical
26 working group met several times and toured the infested area. (AR 000284-000358, 000381,
27 000557-000560, 000644.) On June 8, 2007, the group issued its recommendations which included
28 among other things adopting an eradication strategy beginning with outlier populations—the San

1 Francisco Bay area and Santa Cruz/Monterey local populations. The technical working group
2 recommended a primary eradication strategy of mating disruption by spraying of pheromones. (AR
3 001238-001240.)

4 **2. Emergency Regulations and Notice of Exemption from CEQA.**

5 By April 23, 2007, it was apparent that based on the results of the statewide trapping effort, that
6 the light brown apple moth infestation represented an emergency requiring immediate action. On
7 April 23, 2007, the Secretary for the Department of Food and Agriculture made a finding of
8 emergency, and adopted emergency regulations for immediate action to avoid serious harm to public
9 peace, health, safety or general welfare. (AR 000042-000097.) The first emergency regulation
10 package amended California Code of Regulations, title 3, section 3591.20(a), and established
11 Alameda County and Contra Costa County as eradication areas. (AR 000044.) On June 4, 2007, the
12 Secretary issued additional emergency regulations, and established Marin, Monterey, Napa, San
13 Francisco, San Mateo, Santa Clara, and Santa Cruz Counties as eradication areas. (AR 000801,
14 000821.) On July 13, 2007, the Secretary issued additional emergency regulations, and established
15 Solano and Los Angeles Counties as eradication areas. (AR 001248.) Each of the emergency
16 regulation packages describes the threat posed by the light brown apple moth included economic
17 impacts, and damage to the natural environment. (See e.g., AR 000887-000891.)

18 On August 10, September 24, and September 28, 2007, the Secretary issued Official Notices
19 of an emergency eradication project targeting the light brown apple moth for various cities in
20 Monterey and Santa Cruz. (AR 001557, 001685, 001717.) The Secretary also issued Notices of
21 Exemption from CEQA for each phase of the emergency eradication projects in Monterey and Santa
22 Cruz Counties. (AR 001589.1, 001786-001787.4.)

23 **3. Quarantine.**

24 Both domestic and international trading partners maintain a high degree of interest and concern
25 in the status of the light brown apple moth infestation in California. (AR 000395, 000667, 000734-
26 000740, 000745-000762, 001097-001105.) On May 2, 2007, the U.S. Department of Agriculture
27 issued a Federal Domestic Quarantine Order designating Monterey and Santa Cruz Counties, among
28 other northern California counties, as quarantine areas, and placed conditions upon the interstate

1 movement of certain agricultural products. (AR 000731-000733.)

2 **4. The Light Brown Apple Moth Act of 2007.**

3 In addition to the emergency regulatory actions undertaken by the Secretary of Food and
4 Agriculture, the Secretary reported to the Legislature at least monthly; often several times a month.
5 (AR 000040-000041, 000236-000237, 000340, 0000380, 000411, 000528, 000667-000668, 000740-
6 000741, 000779-000780, 000797-000780, 001245-001246, 001576-1578.) The Secretary reported
7 information including the status of trapping surveys, the projected economic and other damage, the
8 status of quarantine activities involving U.S. and international trading partners, and the status of
9 regulatory and eradication actions. (*Id.*)

10 On September 7, 2007, the Light Brown Apple Moth Act of 2007 became law. (Food & Ag.
11 Code, §6050, et seq.) In that Act, the Legislature declared that “[t]he introduction of the light brown
12 apple moth represents a clear, present, significant, and imminent danger to California’s natural
13 environment and agricultural industry.” (Food & Ag. Code, § 6050, subd. (a).) “The introduction
14 of the light brown apple moth also represents a clear, present, significant, and imminent threat to
15 California’s native areas.” (*Id.*, § 6050, subd. (b).)

16 **ARGUMENT**

17 **I. STANDARD OF REVIEW**

18 Respondents’ determination that the emergency light brown apple moth eradication project was
19 exempt from CEQA is a quasi-legislative action with no administrative hearing. (*See, e.g., Save Our*
20 *Carmel River v. Monterey Pen. Water Management Dist.* (2006) 141 Cal.App.4th 677, 693.)

21 The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of
22 precise formulation, but lies somewhere along a continuum with nonreviewability at one end and
23 independent judgment at the other. (citation omitted.) Quasi-legislative decisions are properly
placed at the point of the continuum at which judicial review is more deferential.

24 (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 575-576.)

25 Under CEQA the Court reviews for substantial evidence Respondents’ determination that the
26 emergency eradication program was exempt from CEQA. (*Calbeach Advocates v. City of Solana*
27 *Beach* (2002) 103 Cal.App.4th 529, 535-536.) Petitioners have the burden of identifying all the
28 evidence in the record, not just their own, and describing for the Court how it fails to meet the

1 standard. (See *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.)

2 The Court's review for substantial evidence is a limited one. "In applying the substantial
3 evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative
4 finding and decision." (*Laurel Heights Improvement Association of San Francisco v. Regents of the*
5 *University of California* (1988) 47 Cal.3d 376, 393.) Most importantly, the Court may not substitute
6 Petitioners' judgment for that of Respondents about the threat posed by the light brown apple moth.
7 The Supreme Court has found that agency determinations related to factual issues are entitled to a
8 high degree of deference because courts are not equipped to weigh competing evidence on highly
9 technical issues. (*Laurel Heights Improvement Association of San Francisco, Inc. v. The Regents*
10 *of the University of California* (1988) 47 Cal.3d 376, 393.)

11 Substantial evidence is relevant evidence that a reasonable mind might accept as adequate
12 support. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.) The
13 Court may reverse Respondents determination of a CEQA emergency only if based on the evidence
14 before it, a reasonable person could not reach Respondents' conclusion. (*Sierra Club v. California*
15 *Coastal Commission* (1993) 12 Cal.App.4th 602, 610.)

16 **II. THE EMERGENCY ERADICATION PROJECT IS EXEMPT FROM CEQA.**

17 " 'Specific actions necessary to prevent or mitigate an emergency' are exempt from CEQA."
18 (*Calbeach Advocates, supra*, 103 Cal.App.4th at 536, citing, Pub. Resources Code, § 21080, subd.
19 (b)(4).) Under CEQA, an "emergency means a sudden, unexpected occurrence, involving a clear and
20 imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life,
21 health, property, or essential public services." The Court must determine that each element of the
22 exemption is supported. (*Calbeach Advocates, supra*, 103 Cal.App.4th at 536.)

23 **A. The Discovery of a Light Brown Apple Moth in the Wild was a Sudden, Unexpected** 24 **Occurrence.**

25 Petitioners seem to be arguing that the appearance of the light brown apple moth in the wild was
26 not a sudden unexpected occurrence. In support of their conclusion Petitioners refer to evidence in
27 the record. (Memorandum of Points and Authorities in Support of Petition for Writ of Mandate
28 (Petitioner's Opening Brief), p. 9, Ins. 10-13.) However, Petitioners argument turns the standard of
review on its head—the court's inquiry is not whether there is evidence to support Petitioner's view,

1 but rather the Court looks to the whole of the record to determine if there is substantial evidence to
2 support Respondents' conclusion. (*Calbeach Advocates, supra*, 103 Cal.App.4th at 535-536.) The
3 evidence in the record establishes that as of late 2003, no occurrences of the light brown apple moth
4 had been reported in the wild (AR 000150), that Respondents had set traps to discover the moth in
5 2005 (AR 000030-000031), and that in early 2007, Respondents confirmed the first detection of a
6 light brown apple moth in the wild. (AR 000027.)

7 It is true that there is evidence to suggest that a small number of moths were intercepted in U.S.
8 ports being transported by a small number of foreign passengers. (AR 000149-000150.) The vast
9 majority of these detections were in Honolulu, with only 2% of the detections in San Francisco.
10 (AR0000150.) However, the evidence establishes a low risk of entry, and shows that government
11 officials prevented the light brown apple moth from entering the county and becoming established
12 in the wild prior to 2007. (AR 000136-000139, 000149-000150.)

13 The significant sudden occurrence in this case is the detection of the light brown apple moth
14 in the wild, not the generally held understanding that an invasive species may present a threat if it
15 becomes established in the United States, or even that there was concern about the light brown apple
16 moth. There are literally limitless invasive species, native to foreign countries, that would threaten
17 the natural environment in the United States if they were to arrive on these shores. The fact that
18 those species exist does not present an emergency, or require that Respondents to spend precious
19 resources to eradicate a pest that has not arrived in California. The need to eradicate, and
20 consequently the emergency is presented only when the invasive exotic pests establish themselves
21 in the wild and threaten economic harm, and damage to native plants and animals. Under Petitioners'
22 theory, in order for Respondents to comply with CEQA, they would have to prepare environmental
23 impact reports for every invasive species world wide that has the potential to arrive in California
24 without regard to when, or if, it ever actually is detected in the wild. This would be an absurd result,
25 create a backlog of old environmental review documents that would be out of date when an invasive
26 species in fact became a threat, and create a waste of the precious few resources that are devoted to
27 eradication of pests.

28 ///

1 The record presents relevant evidence that a reasonable mind might accept as adequate support
2 for the conclusion that the detection of the light brown apple moth in the wild in 2007 was a sudden
3 unexpected occurrence. (*California Youth Authority v. State Personnel Bd.*, 104 Cal.App.4th 584.)
4 Respondents may reasonably conclude that screening at U.S. ports has kept out the limitless number
5 of invasive species that might pose a threat to the environment of California and the United States
6 until the moment when an invasive species is detected in the wild.

7 The Petitioners also seem to be advocating for some semantic difference between “occurrence”
8 and “condition.” The Court should reject such a semantic analysis. The court in *Calbeach*
9 *Advocates*, rejecting that argument, noted that while some courts had “used the terms ‘occurrence’
10 and ‘condition’ in opposition to each other, the distinction is not always a sharp one.” (*Calbeach*,
11 *Advocates, supra*, 103 Cal.App.4th at 537.) The Court in that case also noted that a condition can
12 be made up of many small occurrences until something suddenly happens, concluding that beach
13 erosion of individual grains of sand resulting in a hill collapse amounted to a CEQA emergency.
14 (*Id.*)

15 This case is also analogous to the situation in *Calbeach Advocates*. By March 19, 2007, 27
16 male moths had been trapped at 26 sites in two counties. By August 15, 2007, 7414 moths had been
17 trapped in 1,397 sites in eleven counties. It is reasonable to conclude that the light brown apple moth
18 is proliferating uncontrollably in population and range. (AR 001577.) The damage posed by the
19 individual mating of light brown apple moths is at its most devastating the loss of 85% of a fruit
20 crop. (AR 0000150.) Given the proliferation, that threat is real, and for the farmer who loses a
21 significant portion of his crop, it is a sufficiently sudden occurrence to represent an emergency.

22 Just because such a situation may be anticipated, and consequently there is no documented crop
23 losses in California at this time, does not prevent it from being an emergency. (*Calbeach Advocates*,
24 *supra*, 103 Cal.App.4th at 537.) In rejecting that argument the Court in *Calbeach Advocates* noted
25 that CEQA “exempts not only projects that mitigate the effects of an emergency but also projects that
26 prevent an emergency. In order to design a project to prevent an emergency, the designer must
27 anticipate the emergency. . . . For that reason, we do not interpret section 21060.3 to require that
28 emergencies be unexpected when the project’s purpose is to prevent an emergency.” (*Id.*)

1 In conclusion, CEQA does not require Respondents to anticipate the arrival of the light brown
2 apple moth and conduct a speculative environmental review before any moths are detected in the
3 wild, and a decision is made to conduct an emergency eradication project. However, once the light
4 brown apple moth was detected in the wild, and the decision is made to conduct an emergency
5 eradication project, CEQA allows Respondents to anticipate and prevent the damage to crops and
6 native plants under the emergency exemption. (*Calbeach Advocates. supra*, 103 Cal.App.4th at
7 537.)

8 **B. The Threat Posed by the Light Brown Apple Moth is an Imminent Threat Requiring**
9 **Immediate Action.**

10 The threat posed by the light brown apple moth is clear and imminent danger, demanding
11 immediate action, and satisfies the second part of the definition of a CEQA emergency. (Pub.
12 Resources Code, § 21060.3.) As stated above, ordinarily the Court would look to determine if
13 element of the CEQA emergency was supported by substantial evidence. (Pub. Resources Code, §§
14 21168, 21168.5; *Calbeach Advocates. supra*, 103 Cal.App.4th at 535-536.) However, in this case
15 the Legislature has already made findings establishing that the light brown apple moth is a
16 “significant, and imminent danger to California’s natural environment and agricultural industry” and
17 “native areas,” and represents an imminent threat for adverse effect and ultimate extinction of
18 sensitive plant and animal species.” (Food & Ag. Code, § 6050, subds. (a), (b), (c). The Light
19 Brown Apple Moth Act became law in September, 2007, and was an urgency measure necessary for
20 the immediate preservation of the public peace, health, or safety. (Sen Bill No. 556 (2007 Reg.
21 Sess.) §3.) The legislature used language that is synonymous with the “clear and imminent danger,
22 demanding immediate action” language of a CEQA emergency. (Pub. Resources Code, § 21060.3.)

23 These findings were based at least in part on information provided by respondents to the
24 Legislature in the moths leading up to the passage of the Light Brown Apple Moth Act of 2007, and
25 included the very information that supports Respondents determination of a CEQA emergency. (AR
26 000040-000041, 000236-000237, 000340, 0000380, 000411, 000528, 000667-000668, 000740-
27 000741, 000779-000780, 000797-000780, 001245-001246, 001576-1578.) Separation of powers
28 concerns prohibit the Court from interpreting the evidence in the record inconsistent with the
findings in the Light Brown Apple Moth Act of 2007, and thereby substituting the judgment of Santa

1 Cruz County and the City of Santa Cruz for that of the Secretary of Food and Agriculture and the
2 Legislature.

3 No doubt, as in their papers in support of the temporary restraining order, Petitioners will cite
4 to the legislative history where language identifying the situation as a CEQA emergency was deleted
5 from the final law prior to its passage as evidence that the Legislature rejected that conclusion.
6 (Petitioners' Memorandum of Points and Authorities in Support of Ex Parte Application for
7 Temporary Restraining Order, p. 9, lns. 5-20.)

8 There are two responses to that argument. First, the findings of the Light Brown Apple Moth
9 Act of 2007, and the urgency language, is clear, and consequently the Court may not rely on
10 legislative history to interpret the Act inconsistent with its plain language. (*Hughes v. Board of*
11 *Architectural Examiners* (1998) 17 Cal.4th 763, 775.) Secondly, dropping the language that found
12 a CEQA exemption is consistent with the findings included in the Act. The findings do not address
13 every element of the definition of an emergency included in CEQA. The findings address the "clear
14 and imminent danger, demanding immediate action" portion of the CEQA emergency definition.
15 (Compare Pub. Resources Code, § 21060.3; Food & Ag. Code, § 6050, subs. (a), (b), (c); Sen Bill
16 No. 556 (2007 Reg. Sess.) §3.) Therefore, based on the findings of the Act, it was left to the
17 Secretary of Food and Agriculture to determine if the discovery of the light brown apple moth in the
18 wild satisfied the remaining elements of a CEQA emergency. (See Argument section II, A, above.)

19 Even if the Court were to look at the evidence in the record, there is more than substantial
20 evidence to support the conclusion that the light brown apple moth represents a clear and imminent
21 danger, demanding immediate action. The record establishes that through human assistance the light
22 brown apple moth is rapidly traveling great distances, that the quarantine process has begun and will
23 continue unless Respondents can achieve eradication, that eradication may be impossible or more
24 difficult if treatment is delayed, and that the potential losses are in the hundreds of millions of
25 dollars. (See Statement of Facts above.) This is substantial evidence from which a reasonable
26 person could conclude that immediate action is necessary. (*California Youth Authority v. State*
27 *Personnel Bd.* (2002) 104 Cal.App.4th 575, 584; *Sierra Club v. California Coastal Commission*
28 (1993) 12 Cal.App.4th 602, 610.) It is clear that the County of Santa Cruz and the City of Santa

1 Cruz do not agree with the Secretary's conclusion. However, the standard of review does not allow
2 the Court to substitute Petitioners' judgment for that of the Secretary and the Legislature. (*Id.*)

3 **III. THE DEVELOPMENT OF A LONG TERM STRATEGY WITH A FULL**
4 **ENVIRONMENTAL REVIEW DOES NOT PROHIBIT A SHORT TERM**
5 **EMERGENCY ERADICATION PROJECT WHICH IS EXEMPT UNDER CEQA.**

6 In addition to the emergency eradication projects being challenged in this case, Respondents
7 have initiated a long term project for containment and eradication of the light brown apple moth.
8 This long term strategy is being developed simultaneously with the emergency eradication projects.
9 (AR 001221-001223.) Respondents are currently developing a environmental impact report that will
10 address the impacts on human health and ecological effects, centered around a risk assessment of
11 all components of the compounds, and eradication techniques, that Respondents will use. (California
12 Department of Food and Agriculture, Notice of Preparation of an Environmental Impact Report,
13 available at: http://www.cdfa.ca.gov/phpps/PDEP/lbam/pdfs/docs/LBAM_NOP_020808.pdf.)

14 Petitioners' argument presumes without citation that a CEQA emergency may not be
15 established in this case if a longer term project subject to full environmental review is undertaken
16 simultaneously. However, at least one Court of Appeal noted that the situation presented by this case
17 is quite ordinary when dealing with pest eradication. In *Californians for Alternatives to Toxics v.*
18 *Department of Food and Agriculture* (2005) 136 Cal.App.4th 1, the Court analyzed the application
19 of CEQA to a substantially similar program for eradication of the glassy-winged sharpshooter. (*Id.*
20 at 5-6.) In that case, the Legislature had used less forceful language to declare the emergency finding
21 only that the glassy-winged sharpshooter "present a clear and present danger to California's fifty
22 billion dollar grape industry." (*Id.* at 7-8, citing Food & Agr. Code, § 6045, subd. (a).) The Court
23 in *Californians for Alternatives to Toxics* detailed the development of the threat from the glassy-
24 winged sharpshooter, the passage of legislation to combat the pest, and Respondents' adoption of
25 emergency regulations to implement a statewide response program for arresting the spread of the
26 [glassy-winged sharpshooter] and, where feasible, eradicating it upon detection in noninfested
27 areas." (*Id.* at 6-7.) The Court found that "[b]ecause the emergency regulations and program were
28 created in response to an emergency, they were exempt from CEQA." (*Id.* at 7, citing Cal.Code
Regs., tit. 14, § 15269, subd. (c).) The Court in *Californians for Alternatives to Toxics* cited the very

1 CEQA guideline upon which Petitioners in this case rely. (*Id.*)

2 Petitioners ask this Court to ignore the analysis of *Californians for Alternatives to Toxics* as
3 dicta, however that Court's analysis is based on the application of the proper CEQA standards to a
4 set of facts remarkable similar to this case, and properly recognizes the need for immediate action
5 when confronting pests such as the glassy-winged sharpshooter and the light brown apple moth, at
6 the same time that longer term strategies are developed. The Court in that case concluded that
7 CEQA allows exempt emergency action undertaken simultaneously with full CEQA compliance for
8 development of long term strategies for pest eradication. (*Id.*) The Court in *Californians for*
9 *Alternatives to Toxics* even refused to issue an injunction prohibiting eradication efforts after it had
10 concluded that the full environmental impact report was inadequate in some respects. (*Californians*
11 *for Alternatives to Toxics, supra*, 136 Cal.App.4th at 21-22.) This is a further indication that the
12 Court recognized the need for early intervention while a full environmental review was being
13 completed.

14 The Legislature has also recognized that when confronting pest infestation, timing and prompt
15 action is of utmost importance. "Timeliness in the application of pesticides is paramount in good
16 pest management in good pest management and is essential in the prevention of economic waste."
17 (*City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, 976, fn. 8,
18 citing Statutes 1978, chapter 308, sec. 1.)^{3/}

19 Finally, it can not be seriously disputed that the Legislature has delegated to the Secretary of
20 Food and Agriculture the authority to declare emergencies and conduct emergency eradication
21 projects. (Food & Agr. Code, §§ 5321-5323.) Petitioners' argument that merely because
22 Respondents are developing a long term eradication strategy subject to full environmental review,
23 they may not properly conduct emergency eradication projects under a CEQA exemption, interprets
24 out of existence the Secretary of Food and Agriculture's authority to conduct emergency eradication
25 projects. The Court is required to interpret these statutes in context, and harmonize the Secretary's

26
27 3. The Court in *City of Sacramento v. State Water Resources Control Board* analyzed the pesticide regulatory program
28 contained in the Food and Agriculture Code as a certified regulatory program, or functional equivalent program under CEQA. (*City*
of Sacramento v. State Water Resources Control Board, supra, 2 Cal.App.4th at 975-977.) By citing *City of Sacramento v. State*
Water Resources Control Board, Respondents do not intend to imply that they may rely solely on the environmental review conducted
under the pesticide regulatory program to satisfy their obligation to conduct a full environmental review of the long term eradication
strategy. That contention has been rejected by the Court in *Californians for Alternatives to Toxics*. (*Californians for Alternatives*
to Toxics, supra, 136 Cal.App.4th at 18-21.)

1 authority under the Food and Agriculture Code with CEQA where possible. (See, *Coastside Fishing*
2 *Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1194-1195.) The Court must
3 also avoid interpretations that void any part of the statutory scheme. (*Calbeach Advocates, supra*,
4 103 Cal.App. 4th at 537.) Therefore, the Court should reject Petitioners' arguments, and find that
5 Respondents may properly conduct emergency eradication projects under a CEQA emergency while
6 simultaneously developing a long term strategy subject to full environmental review.

7 **CONCLUSION**

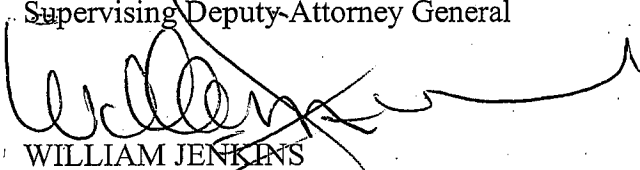
8 Because Petitioners have failed to carry their burden of establishing a lack of substantial
9 evidence supporting the Respondents' Notice of Emergency Exemption from CEQA, Respondents
10 request that the Court deny the motion.

11
12 Dated: April 10, 2008

13 Respectfully submitted,

14 EDMUND G. BROWN JR.
Attorney General of the State of California

15 JOHN DAVIDSON
16 Supervising Deputy Attorney General

17 
18 WILLIAM JENKINS
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19 Attorneys for Respondents
20 California Department of Food and
21 Agriculture, A.G. Kawamura

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *County of Santa Cruz v. Calif Department of Food and Agriculture, et al.*
Case No.: **CV 158516 (Consolidated with CV 158523)**

I, Joan Randolph, declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.


On April 10, 2008, I served the attached **BRIEF IN OPPOSITION TO MOTION SEEKING WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope with the **FedEx Express overnight courier service**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 10, 2008, at San Francisco, California.

Joan Randolph
Declarant


Signature